IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JAMES M. PETERSON and ANNE E. PETERSON, husband and wife, Appellants, v. J. B. HUNT TRANSPORT, INC., Respondent.	No. 32894-1-II UNPUBLISHED OPINION

QUINN-BRINTNALL, C.J. — J. B. Hunt Transport, Inc. filed a motion to strike certain unpaid wages claims brought by James Peterson. Although the motion was not denominated as such, it was treated as a partial summary judgment motion by the parties and the superior court. In opposition to the motion, Peterson filed an unsigned declaration. The superior court viewed the entire record, including Peterson's unsigned declaration, and granted J. B. Hunt's motion. Peterson appeals.

A court cannot give credence to an unsigned declaration. Because Peterson did not submit admissible evidence in opposition to J. B. Hunt's motion, we affirm.

FACTS

Under RCW 49.46.130(1), an employer must pay an employee at an overtime rate for hours worked in excess of 40 hours per week.[1] An employee is also entitled to a paid 10-minute rest period for every three hours worked and an unpaid 30-minute meal period for every five hours worked. WAC 296-126-092(1)-(2), (4). An employee must be paid for his meal period if he is required by the employer to "remain on duty on the premises or at a prescribed work site in the interest of the employer." WAC 296-126-092(1). An employee required to work through his rest period is entitled to an additional 10 minutes of pay. *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 849, 50 P.3d 256 (2002). However, "[w]here the nature of the work allows employees to take intermittent rest periods equivalent to 10 minutes for each 4 hours worked, scheduled rest periods are not required." WAC 296-126-092(5).

Peterson is a truck driver for J. B. Hunt. Peterson's duties consist largely of the pickup and delivery of freight containers in the Puget Sound region. Until May 2002, drivers for J. B. Hunt were paid for a guaranteed 45-hour work week. The 45 hours included two daily 10-minute rest periods and a gratuitously paid daily 30-minute meal period; the meal periods were, however, subtracted from the total hours worked for purposes of calculating overtime. J. B. Hunt drivers are required to maintain a daily activity sheet listing the driver's starting and ending time, and the

[1] RCW 49.46.130 does not apply to

> [a]n individual employed as a truck or bus driver who is subject to the provisions of the Federal Motor Carrier Act . . . if the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to that required by this subsection, for working longer than forty hours per week.

RCW 49.46.130(2)(f). The superior court found that J. B. Hunt "is a trucking company subject to the federal Motor Carrier Act." 2 Clerk's Papers (CP) at 333. However, J. B. Hunt's briefing assumes, and therefore so do we, that Peterson would be paid overtime for hours over 40 per week.

time and place for all deliveries and pickups; drivers are not required to keep track of their rest and meal periods.

Prompted by a state inquiry, J. B. Hunt audited Peterson's payroll record for the period of July 1999 through July 2002. J. B. Hunt concluded that Peterson was owed $1,493.56 in back wages for this period (the "undisputed amount"). Peterson declined J. B. Hunt's tender of the undisputed amount.

In July 2002, Peterson sued J. B. Hunt. In addition to the undisputed amount, Peterson sought $1,937.50 in pay for unprovided meal periods and $2,885.34 in overtime pay for unprovided rest periods.[2] Peterson alleged that J. B. Hunt had willfully withheld all amounts sought and that he was entitled to double damages under RCW 49.52.050 and .070. According to Peterson, although J. B. Hunt gratuitously paid him straight time for his meal periods, he was entitled to payment at his overtime rate because he was not allowed to leave his truck during meal periods. Peterson also maintained that he was entitled to additional overtime compensation for his paid rest periods because he was on call during those periods and he was never informed that he could take such breaks.

J. B. Hunt filed a "MOTION IN LIMINE TO STRIKE INVALID WAGE CLAIMS." 2 Clerk's Papers (CP) at 227. J. B. Hunt maintained that Peterson was not "on duty" during his meal periods and that he had ample time during his daily activities to take 10-minute rest periods. J. B. Hunt submitted an employee manual informing drivers that once their vehicle was properly parked, the driver was released from responsibility for the vehicle and "at liberty to

[2] Peterson also sought $80.59 for overtime pay based on paid time-off hours and $127.76 for hours worked in June and July 2002. Peterson's appeal does not raise these claims and we do not discuss them.

pursue activities of your own choosing and to leave the premises on which the vehicle is situated." 1 CP at 138. J. B. Hunt also submitted a declaration summarizing the contents of Peterson's daily activity sheets for the period at issue. Peterson's sheets showed 192 hours of recorded meal periods and "that on nearly every single day that he failed to record a 'lunch,' he had waiting time for the pickup or delivery of a load that consumed one or more hours in duration." 2 CP at 249. Peterson's sheets also reflected "ample time for the paid rest breaks to which he was entitled during his many other daily stops for the pickup and delivery of customer loads." 2 CP at 249.

Peterson opposed the motion by submitting an unsigned declaration that read as follows:

> That while employed with J. B. Hunt Transport, Inc. while I was on duty I was required to stay with my truck at all times. It was not possible for me to leave the vehicle and go anywhere during my lunch breaks I [sic] was required to remain with the truck at all times. There were times before I left the plant with my truck that I was required to wait in the break room on call while my truck was being unloaded. I was not permitted to go anywhere else at that time. On one instance while I was at lunch at the plant the mirror on my truck was broken by another truck driver and I was written up for it. I was never advised that I could take 10 minute breaks for every four hours worked.

2 CP at 295-96.

The superior court granted J. B. Hunt's motion. It entered written findings of fact that included a finding that Peterson had ample free time for his meal and rest periods. The court concluded that while Peterson "was at all times generally 'responsible for his truck' . . . and therefore arguably 'on call,'" this did not change the nature of Peterson's rest periods. 2 CP at 339. The court certified its order for appeal under RAP 2.2(a)(3), leaving unresolved the issue of whether the undisputed amount had been willfully withheld.

ANALYSIS

Peterson maintains that the superior court erred in ruling on the disputed facts of whether he received meal and rest periods. To address these issues, we must first determine the appropriate standard of review. J. B. Hunt titled its motion a "MOTION IN LIMINE" to strike certain claims. 2 CP at 227. Generally, a motion to strike claims is made in the context of a pleading that fails to give the opposing party fair notice of what the claim is and the ground upon which it rests. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 857, 22 P.3d 804 (2001). Further, a motion in limine is intended to "avoid the requirement that counsel object to contested evidence when it is offered during trial." *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995).

Here, the parties and the superior court treated J. B. Hunt's motion in limine as a motion for partial summary judgment: Summary judgment is proper if the evidence viewed in a light most favorable to the nonmoving party shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). The superior court granted J. B. Hunt's motion indicating that, in its opinion, the undisputed facts and case law established that J. B. Hunt was entitled to judgment as a matter of law. On appeal, the parties continue to treat the ruling as one for summary judgment. And at oral argument, Peterson's counsel maintained that it would be appropriate to view the superior court's ruling through a summary judgment framework. We agree and do so accordingly.

We review an order of summary judgment de novo, performing the same inquiry as the superior court. *Mohr v. Grant*, 153 Wn.2d 812, 821, 108 P.3d 768 (2005). A party moving for

summary judgment must submit admissible evidence establishing that there is no issue of material fact; the nonmoving party must then set forth specific facts through admissible evidence showing that there is a genuine issue for trial. *White*, 131 Wn.2d at 9. If the nonmoving party fails to do so, then summary judgment is appropriate for the moving party. *White*, 131 Wn.2d at 9 ("Where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted.").

Peterson asserts that he presented two factual issues: First, did Peterson receive rest periods, i.e., periods of relief from work or exertion? If he did, then he is not entitled to additional pay even if he had to be "on call" in the sense that he had to stay with his truck. *White v. Salvation Army*, 118 Wn. App. 272, 283, 75 P.3d 990 (2003), *review denied*, 151 Wn.2d 1028 (2004). Second, was Peterson "on call" during his undisputedly taken meal periods? If he was, then Peterson was entitled to have those hours included in his total hours worked for purposes of calculating his overtime. RCW 49.46.130; WAC 296-126-092(1). If these two factual issues were disputed, it would not have been appropriate for the superior court to resolve them in a summary judgment motion. *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21, 586 P.2d 860 (1978).

J. B. Hunt submitted admissible evidence—including an employee manual and Peterson's daily activity sheets—that showed Peterson was instructed to take rest and meal periods; was informed that he was relieved of work responsibilities during his meal periods; was able to take his breaks as part of his unsupervised job; and had documented many of his meal periods. In response, Peterson submitted only an unsigned declaration that he was required to stay with his truck during all breaks and that he was not informed that he could take rest periods. Peterson

maintains that this declaration was sufficient to create genuine issues of material fact. We disagree.

We review de novo a motion for summary judgment based on the *admissible evidence* submitted to the superior court. Here, Peterson submitted no admissible evidence establishing material issues of disputed fact. The evidence Peterson offered to rebut J. B. Hunt's motion was an unsigned declaration.[3] A court may not consider or give credence to an unsigned declaration or affidavit when ruling on summary judgment motions. *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 735, 740 n.49, 744, 844 P.2d 1006 (1993), *cert. denied*, 510 U.S. 1047 (1994); *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993). "[A]n 'unsigned affidavit' is a contradiction in terms. By definition an affidavit is a 'sworn statement in writing made . . . under an oath or on affirmation before . . . an authorized officer.'" *Our Lady of Lourdes Hosp.*, 120 Wn.2d at 452 (alterations in original) (quoting *Mason v. Clark*, 920 F.2d 493, 495 (8th Cir. 1990)). An affidavit requires "a solemn, formal asseveration, under oath, upon which others might rely." *Kent v. Lee*, 52 Wn. App. 576, 579, 762 P.2d 24 (1988). Because Peterson did not produce admissible evidence demonstrating a genuine issue for trial, J. B. Hunt was entitled to summary judgment as a matter of law. *White*, 131 Wn.2d at 9.[4]

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[3] Peterson maintained at oral argument that a signed declaration was submitted to the superior court. We therefore granted Peterson a limited period to supplement our record with this document. What Peterson submitted was an affidavit ostensibly signed and dated during the superior court proceedings *but* filed with the superior court clerk's office the day after oral argument before this court. This is not the document that was presented to the superior court. We, therefore, do not consider it. *See Ellis v. City of Seattle*, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000).

[4] We note that, even signed, Peterson's declaration does not establish a material dispute as to whether he received 10-minute periods of relief from work or exertion—the core of his rest period pay claim. Although Peterson maintained that he was "never advised" that he could take 10-minute breaks, he did not assert that he did not take the breaks on his own accord. The thrust of Peterson's affidavit was that he did not receive rest periods because he was required to stay with his truck "at all times." 2 CP at 295. But under Division One's opinion in *White*, 118 Wn.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

BRIDGEWATER, J.

ARMSTRONG, J.

App. at 283—a case Peterson called "good law" below, Report of Proceedings at 11, and does not now dispute—an employee has received a rest period even though he remains on call or is required to remain in a certain spot.